No. 13345

In the United States Court of Appeals for the Ninth Circuit

THE STATE OF OREGON, THE FISH COMMISSION OF OREGON, THE OREGON STATE GAME COMMISSION, PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT
PORTLAND GENERAL ELECTRIC COMPANY, INTERVENER

BRIEF FOR RESPONDENT, FEDERAL POWER COMMISSION

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JURISDICTIONAL STATEMENT

This is a proceeding under Section 313 (b) of the Federal Power Act [1] to review an order of the Respondent Commission issuing a license pursuant to Part I of the Act authorizing the Portland General Electric Company [2] to construct, operate and maintain a water-power development designated by the Commission as Project No. 2030 and commonly known as the Pelton Project, to be located on the Deschutes River in Jefferson County, Oregon.

The project, if constructed, would occupy lands of the United States set aside on the west side of the Deschutes River by treaty in 1855 as the Warm Springs Indian Reservation, and additional lands of the United States on the east side of the river. All of the lands of the United States on both sides of the river which would be occupied by the project have been withdrawn from entry, location or other disposal under the

[1] 49 Stat. 851; 16 U. S. C. § 791 (a), *et seq.* In lieu of printing as an appendix to this brief the numerous provisions of the Act, which we cite, we are lodging with the Clerk pamphlet copies of the Act for more convenient reference.

[2] Hereinafter referred to as "the Company."

public land laws and reserved for power purposes. In addition to these lands, some private lands would be affected by the project.

The high power dam, and the powerhouse immediately below, will be located entirely upon lands of the United States set aside and reserved for power purposes. These are the structures which will divert and utilize the waters for power purposes and block the anadromous fish runs—the two features of the project for which State approval has been withheld.

The status of all lands affected is shown in the map attached to the back of this brief. A general map is also attached showing the Deschutes River drainage basin.

The Commission's jurisdiction to entertain the application, and to issue a license for the project, was conferred by the provisions of the Federal Power Act (16 U. S. C. 791a, *et seq.*), particularly Sections 4 (e) and 23 (b). Section 4 (e) authorizes the Commission to issue licenses for project works located "upon any part of the public lands and reservations of the United States," and Section 23 (b) provides, in part, "It shall be unlawful for any person, state, or municipality, for the purpose of developing electric power, to construct, operate or maintain any dam, water conduit, reservoir, powerhouse, or other works incidental thereto * * * upon any part of the public lands and reservations of the United States * * * except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this Act * * *."[3]

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[3] Petitioners state (Pet. Br. 12) that: "The Federal Power Commission found that the Deschutes River is a nonnavigable stream; that the proposed project would not affect interstate or foreign commerce; * * *." An examination of the Commission's opinion, findings, and order (R. 417–447) shows that no such findings were made by the Commission, as alleged by Petitioners. The Commission based its jurisdiction solely on the fact that the project would occupy lands of the United States. Upon consideration of an appropriate record disclosing all of the facts with respect to navigability or nonnavigability of the Deschutes and Columbia Rivers, the Commission might be justified in making the findings required to assert jurisdiction over the project under the commerce clause of the Constitution of the United States. However, the question of the navigability or nonnavigability of the Deschutes River was not raised before the Commission and the Court is without jurisdiction to consider it. *Panhandle Eastern Pipe Line Co.* v. *F. P. C.*, 324 U. S. 635, 645, 649.

Should the Company attempt to construct its project on lands of the United States without some special authority from Congress, or without a license under the Federal Power Act, the Company could be ousted from the lands.[4]

The Petitioners admit that the proposed project would occupy lands of the United States (R. 503), but controvert the Commission's jurisdiction and authority to issue the license to the Company primarily upon the refusal of the State to approve the project (Pet. Br. 24–25).

COUNTERSTATEMENT OF CASE

Portland General Electric Company, as successor in interest of Northwest Power Supply Company, applied to the Federal Power Commission for a license pursuant to Section 4 (e) of the Act to authorize construction, operation and maintenance of Project No. 2030 (Pelton Project) on Deschutes River in Jefferson County, Oregon.

The project, if constructed, would consist of a concrete arch dam approximately 205 feet high creating a reservoir with normal pool at elevation 1,580 feet; three short penstocks to convey water from the reservoir to a powerhouse, immediately below the dam, containing three 52,000-horsepower turbines operating under a gross head of about 152 feet connected to three 36,000-kilowatt generators making a total installed capacity of 108,000 kilowatts; a spillway; and a transmission line to take the power away from the powerhouse. In addition, there would be a re-regulating dam located about three miles downstream and facilities to conserve the fishery resources at the project site. The re-regulating dam was added to the project at the insistence of the Hydroelectric Commission of Oregon that the Company submit plans for either eliminating or regulating the operational fluctuations of water below the dam to an amount which will not be dangerous to human life or injurious to fish life (R. 506; Ex. 8). Although the project will be utilized as a peaking plant by operating the generating

[4] *United States* v. *Utah Power & Light Co.*, 243 U. S. 389; *Pacific Gas & Electric Co.* v. *United States*, 45 F. 2d 708, cert. den., 283 U. S. 862. See also *F. P. C.* v. *Idaho Power Company*, 344 U. S. 17.

equipment only during certain periods each day, with the result that there will be wide fluctuations in flow immediately below the powerhouse, the stream flow in the river downstream from the re-regulating dam will be substantially the same as the stream flow without the project because of re-regulation of flow afforded by the re-regulating dam and reservoir.

Since construction of the power dam will block the natural passage of anadromous fish runs, the Company proposes, in order to conserve the fish, to construct certain facilities in accordance with a program suggested by the Oregon Fish Commission (Ex. 12). These facilities may be described generally as the re-regulating dam and facilities at that dam necessary (a) to trap the fish as they proceed upstream to spawn, (b) to hold the trapped fish until they reach sexual maturity, (c) to take eggs from the trapped fish, (d) to haul eggs to the Metolius hatchery, and (e) to haul fingerlings from the hatchery for release in other streams (Exs. 10, 12, 13). In addition, the Metolius hatchery would be enlarged to handle about 14,500,000 Spring Chinook salmon and summer steelhead trout eggs to produce about 340,000 pounds of fingerlings each year (R. 1005–1006; Ex. 12). The capital costs are estimated to be $3,430,000 for the re-regulating dam and $1,000,000 for the fish facilities, including enlargement of the existing hatchery (R. 420, 588–589, 591).

Detailed plans of the proposed fish conservation facilities have not been made, but the license requires that in preparing plans and construction schedules for fishery facilities the Company must consult and cooperate with the U. S. Fish and Wildlife Service and the Fish and Game Commissions of Oregon. In addition, such plans must be submitted to and approved by the Commission before construction of the project, and the fishery facilities must be constructed simultaneously with the power facilities in such manner as to maintain the populations of anadromous fish during the construction period and thereafter (R. 445).

The Company is required under the license to bear the expense of operating and maintaining the re-regulating dam and other fishery facilities and has offered to pay $100,000 annually to the State of Oregon to defray the additional expense

of operating and maintaining the hatchery and other fish facilities required as a part of the project. The record was inadequate to permit the fixing of this operation and maintenance payment, but the license requires the Company to negotiate with the State Fish Commission with respect to the amount of this annual payment. If no agreement is reached, the Commission will subsequently determine the amount to be paid (R. 445–446).

There is no real controversy between the Company and the Petitioners, except for the question of fish conservation (App. A). However, the Petitioners raise certain legal objections to the issuance of the license for the project and question certain findings of the Commission.

The Commission concluded that the project will be in the public interest and will provide for comprehensive development of the affected stretch of the Deschutes River and will be consistent with further comprehensive development of that stream and of the Columbia Basin, including conservation and possible enhancement of the fishery resources of the Deschutes River. In addition, the Commission found that the improvements to be provided by the project will contribute valuable public benefits which will not accrue if the river is maintained in its present natural condition (R. 427). Under these circumstances, the Commission entered its order of February 29, 1952, issuing a license for the project (R. 428–446). It is this order which the Petitioners would have this Court set aside.

The brief of the Oregon Division of the Izaak Walton League of America, Inc., filed as *amicus curiae,* is devoted entirely to an argument that 18 findings made by the Commission in its Opinion No. 222, and its order issuing license for Project No. 2030, are not supported by substantial evidence. The Petitioners made no argument on these findings, but stated they were omitted to avoid duplication (Pet. Br. 15).

It should be noted, however, that there are six findings listed in the Izaak Walton brief as not being supported by substantial evidence which may not be questioned or argued in this Court. These findings are: (1) findings numbered 1, 2, and 3 on pages 2 and 3 of the brief, and argued on pages 4, 5, and 6;

and (2) findings numbered 1, 2, and 3 on pages 13 and 14 of the brief, and argued on pages 15 and 16.

These findings may not be questioned at this time, because Petitioners failed to include them in their statement of points upon which they intend to rely as being findings not supported by substantial evidence, and the subject matter of the findings is not questioned otherwise in the other points upon which Petitioners rely.

In reliance upon Petitioners' statement of points, served at the time they designated the parts of the record to be printed, the Respondent omitted from its additional designation those parts of the record which would show that these six findings are supported by substantial evidence.

The six findings relate to the annual costs of fish facilities; annual values attributable to the project, including the value of the power to be generated; the existing and future power supply and demand in the Pacific Northwest and in the area served by the Company; and the nonavailability to the Company of other adequate hydroelectric sites.

Court Rule 19, paragraph 6, requires Petitioners to file a concise statement of points upon which they intend to rely, and further provides that "the court will consider nothing but * * * the points so stated." Of course, the Izaak Walton League, as *amicus curiae,* may not rely upon points other than those stated by the Petitioners.

At the time counsel for the Commission was preparing Respondent's designation of the record to be printed, the precise question was raised with counsel for Petitioners as to whether he intended to question findings similar to the six involved here. Counsel for Petitioners informed counsel for Respondent that:

> I did not, during the hearing before the Federal Power Commission or in the several briefs filed by me, question the testimony relative to power value, power market and any other aspects of the purely power economic and technical phases of the case.

The pertinent portions of the correspondence on this matter appear herein as Appendix A and the Statement of Points, filed by Petitioners, appear as Appendix B.

In view of the above, these six findings are not considered as being before the Court and, consequently, Respondent will not present argument with respect to the question of whether they are supported by substantial evidence.

QUESTIONS PRESENTED

The petition for review raises the following questions for determination by the Court:

1. Has the State of Oregon been given authority to regulate and control the use for power purposes of the waters or the fishery resources in the waters flowing across reserved lands of the United States and across lands within the Warm Springs Indian Reservation which would be occupied by the Pelton Project under a Federal Power Act license?

2. May the United States withdraw any of its public lands from the category of lands to which the Acts of 1866, 1870, and 1877 are applicable?

3. Does Section 9 (b) of the Federal Power Act require State approval of a proposed power project in order to validate a license thereunder?

4. Does the record support the challenged findings upon which the Commission based its order issuing a license for the Pelton Project?

SUMMARY OF ARGUMENT

This controversy concerns the use of reserved Federal lands and the waters of the allegedly nonnavigable Deschutes River on those lands for the development of electric power, notwithstanding refusal of the State of Oregon to approve the proposed construction. The Constitution gave Congress unlimited power to dispose of those lands and the reservation of those lands was within the constitutional authority. No vested water rights are asserted and therefore the cases cited by Petitioners involving water use on public lands under State law where private claims are asserted are not in point. The reservation of the Pelton Project lands severed those lands from the public domain and removed them from Federal statutes of 1866, 1870, and 1877.

A Federal Power Act license may authorize the occupancy of Government lands and the use of water resources thereon. The

intention of Congress to assert control over fishery resources affected by a licensed project is shown by the Federal Power Act and by the Wildlife Resources Act of 1946 and there is no claim here that the United States has consented to State control over the fishery resources within the Warm Springs Indian Reservation lands which will be occupied by the Pelton Project.

The contention of Petitioners that compliance with Oregon laws by this licensee is essential for validity of the Federal license is not supported by the Federal Power Act or decisions thereon. The two cases cited by Petitioners, *First Iowa Co-operative* v. *F. P. C.*, 328 U. S. 152, and *State of Iowa* v. *F. P. C.*, 178 F. 2d 421 (C. A. 8, 1949), cert. den., 339 U. S. 979, support the Commission rather than Petitioners. Although the rivers involved in the *Iowa Cooperative* cases were navigable and the Deschutes River is herein alleged to be nonnavigable, the reasoning of the courts in those cases is equally applicable to the comprehensive development under the Federal Power Act of water-power resources on the reserved lands of the United States.

Contrary to contentions of Petitioners, the Commission has not disregarded either the fishery resources or the recreational values in the Deschutes River, but it has provided measures which are designed to preserve and enhance those resources and values. The factual record supports the Commission's findings.

This river is not a particularly plentiful producer of salmon and steel-head trout, especially in recent years. Continually increasing irrigation diversions have completely dried up the upper reaches of the river during low flow periods and the river supports only a remnant of its former fish runs. The measures required by the Commission for fish propagation and protection, based principally upon evidence by the witnesses of Petitioners, give every indication of increasing the usefulness of this stream for fishery purposes and, as a corollary, there is every indication from the experience in other areas that there will be an increase in the recreational use of the river and of the area.

Finally, Petitioners overlook the established judicial recognition of the assignment of responsibility in the issuance of such

licenses. Congress has placed the responsibility upon the Commission, not upon the courts, for deciding what measures should be adopted for the protection of Federal water resources which are to be used for the development of electric power.

ARGUMENT

I. The State of Oregon has not been given the power to regulate or control the use of the waters or the fishery resources in the waters on reserved lands of the United States or on lands within the Warm Springs Indian Reservation to be occupied by the Pelton Project under license

The State lacks power to regulate use of these waters for power purposes

At the outset it should be noted that Petitioners do not contend, nor does the record show, that there are any existing claims under State law to the use of the waters of the allegedly nonnavigable Deschutes River which would be interfered with by use of those waters for power purposes under the Federal license issued to the Company. The original Pelton Project was to consist of the high dam with the power plant immediately below and the reservoir extending upstream. This dam and power plant will cause the obstructions to which the State objects. The re-regulating dam will not provide for power generation but was added at the insistence of the State to smooth out the fluctuations in power plant discharge due to peaking operation.

Therefore, the controversy concerns the right of the United States to license the construction of the high dam and power plant, notwithstanding the objections of the State of Oregon. The question is: Does the validity of the Federal Power Act license depend upon State approval?

All of the cases involving water use under State law cited by Petitioners in support of their contention that the license is invalid, concern controversies or cases between private conflicting claimants, or between private claimants and the United States, to water rights alleged to be vested under State law. Since there is no claim of any vested rights in the waters of the Deschutes River in the instant case, the cases cited by Petitioners are not applicable or controlling.

The constitutional provision under which the Commission, as the agent of Congress, is authorized to issue licenses for power projects on lands of the United States is contained in article IV, section 3, clause 2 of the Constitution of the United States, which provides in part:

> The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the territory or other property belonging to the United States * * *.

The power over the lands of the United States thus entrusted to Congress is without limitation and Congress may constitutionally limit the use or disposition of those lands to a manner consistent with its views of public policy. *United States* v. *California,* 332 U. S. 19, 27 (1947); *United States* v. *City and County of San Francisco,* 310 U. S. 16, 29 (1940).

In the absence of specific authority from Congress, a State cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the Government property. *United States* v. *Rio Grande Dam and Irrigation Company,* 174 U. S. 690, 703; *cf. First Iowa Cooperative* v. *F. P. C.,* 328 U. S. 152, and *United States* v. *Gerlach Live Stock Co.,* 339 U. S. 725, 739. Thus, to substantiate its claim that it may control the use of the water of the Deschutes River on the lands of the United States involved here, the State of Oregon must show that Congress has given it such power by express grant, since it is not an inherent State right as applied to Federal lands.

Petitioners attempt to make this showing by relying upon the Federal Acts of 1866, 1870, and 1877 [5] by the United States, as irrevocable and unconditional surrender or relinquishment to the State of Oregon of whatever rights the United States had under the Federal Constitution to control the use of the waters of the allegedly non-navigable Deschutes River on the lands of the United States involved here (Pet. Br. 24–33).

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[5] Act of July 26, 1866 (14 Stat. 251); Act of July 9, 1870 (16 Stat. 217); codified together as 43 U. S. C. 661; and Act of March 3, 1877 (43 U. S. C. 321). The pertinent provisions appear on pages 27–29 of Petitioners' brief.

In support of this contention, Petitioners rely upon *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U. S. 142 (1935). However, all that the Court said in that case, so far as relevant here, is that the Desert Land Act of 1877 is applicable where a grantee has taken water rights in accordance with State laws or customs (*Williams* v. *City and County of San Francisco,* 133 P. 2d 70, 72; cert. den., 319 U. S. 771). No water rights have been granted by the State of Oregon on the Deschutes River which would interfere with the use to be made under the license, and plainly the *California Oregon* case does not suggest that by the Act of 1877 the United States made any general surrender of Federal rights to the State of Oregon, or that prior to State action the United States could not withdraw its Government lands from the class of those to which the 1877 Act was applicable.

The power sometimes delegated by Congress to the States to control water on nonnavigable streams on *public lands* may be withheld (as it was on the Warm Springs Reservation in 1855) or it may be withdrawn (as it was on the lands on the east bank) by changing the status of the lands from public lands to reserved lands and such reservations may be for the use of the United States, or for the use of others.[6]

The lands of the United States on the west side of the Deschutes River were reserved in 1855 by the treaty establishing the Warm Springs Indian Reservation (12 Stat. 963), and part of the lands on the east bank were reserved for power purposes in 1909.[7] The Indian tribal lands[8] and the remainder of the public lands were reserved for power purposes by subsequent power withdrawals[9] and pursuant to the provisions

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[6] *Winters* v. *United States*, 143 Fed. 740; 207 U. S. 564, 577; *United States* v. *Conrad Investment Co.*, 156 Fed. 123 (Indian Reservation); Sec. 10 of Stock-Raising Homestead Act of December 29, 1916, 39 Stat. 862; 43 U. S. C. 300 (Public Water Reserves); 30 Stat. 908; 16 U. S. C. 495 (Reservation of Medicinal Springs).

[7] Power Site Reserve No. 66, created Dec. 30, 1909, by order of the Secretary of the Interior, made permanent by Executive Order of July 2, 1910, pursuant to Act of June 25, 1910 (36 Stat. 847).

[8] Indian Power Site Reserve No. 2, created Nov. 1, 1910 by the Secretary of the Interior, pursuant to the Act of June 25, 1910 (36 Stat. 855).

[9] Power Site Reserve No. 294, created by Executive Order of Oct. 8, 1913, pursuant to the Act of June 25, 1910 (36 Stat. 847).

of Section 24 of the Federal Power Act, upon the filing of the application for license for Project No. 57 in 1920, and upon filing of the application for Project No. 2030 in 1949 by the Northwest Power Supply Company.[10]

The creation of these reservations brought into play the established principle that the creation of a Federal reservation severs the reserved land from the public domain, disposes of the same, and appropriates it to a public use. *United States* v. *Minnesota,* 270 U. S. 181, 206 (1926); *Shannon* v. *United States,* 160 Fed. 870, 873 (C. C. A. 9, 1938). The Acts of 1866, 1870, and 1877 do not apply to those lands set apart and reserved from the public domain. *Minnesota* v. *Hitchcock,* 185 U. S. 373, 387; *United States* v. *McIntire,* 101 F. 2d 650 (C. C. A. 9, 1939).

The State has no jurisdiction over fishery resources in these waters

Petitioners cite the Territory of Oregon Act (August 14, 1848, 9 Stat. 328) and certain constitutional and statutory provisions of the State of Oregon in support of the claimed State control over construction of dams in streams in which salmon are found (Pet. Br. 18–20). To the extent that the Territory of Oregon Act or other Federal statutes enacted prior to the Federal Power Act are inconsistent with the provisions of the latter Act, those prior acts are repealed (Federal Power Act, Sec. 29). Therefore, the provisions of the Federal Power Act, providing for comprehensive development of water resources in navigable streams and their tributaries and upon lands of the United States, supersede or repeal any provisions to the contrary in the 1848 statute, or other prior Federal act, insofar as they relate to the Pelton Project.

That Congress did intend to assert Federal control over fish and wildlife resources affected by Federal water projects and by projects to be constructed by *any public or private agency under Federal permit,* is clearly demonstrated by passage of

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[10] The pertinent part of Sec. 24 of the Federal Power Act provides:

"SEC. 24. Any lands of the United States included in any proposed project under the provisions of this Part shall from the date of filing of application therefor be reserved from location, entry or other disposal under the laws of the United States until otherwise directed by the Commission or by Congress."

the Wildlife Resources Act of August 14, 1946 (60 Stat. 1080),[11] which provided a procedure for State and Federal cooperation with a view to preventing loss or damage to fish and wildlife resources affected by any such project. This 1946 statute requires that "due consideration be given to the requirements of those resources [fish and wildlife] as well as the requirements of such other resources as may be affected by those programs", as stated in House Report No. 1944, 79th Congress, 2d session.[12] That Act requires that the Federal Power Commission shall consult with the State Fish and Game Commissions to obtain their recommendations with respect to the fish and wildlife resources affected by the Pelton Project, but there is no provision requiring the Commission to adopt the recommendation of the State agencies. Insofar as the 1946 act is concerned, the final decision as to how the fishery resources problem is to be handled is left up to Congress in the case of a Federal project and is left up to the Federal Power Commission in cases involving projects licensed under the Federal Power Act.[13]

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[11] The statutory provision in question is Sec. 2 of the Act of August 14, 1946, which reads as follows:

"SEC. 2. Whenever the waters of any stream or other body of water are authorized to be impounded, diverted, or otherwise controlled for any purpose whatever by any department or agency of the United States, or by any public or private agency under Federal permit, such department or agency first shall consult with the Fish and Wildlife Service and the head of the agency exercising administration over the wildlife resources of the State wherein the impoundment, diversion, or other control facility is to be constructed with a view to preventing loss of and damage to wildlife resources, and the reports and recommendations of the Secretary of the Interior and of the head of the agency exercising administration over the wildlife resources of the State, based on surveys and investigations conducted by the Fish and Wildlife Service and by the said head of the agency exercising administration over the wildlife resources of the State, for the purpose of determining the possible damage to wildlife resources and of the means and measures that should be adopted to prevent loss of and damage to wildlife resources, shall be made an integral part of any report submitted by any agency of the Federal Government responsible for engineering surveys and construction of such projects."

[12] See also Senate Report No. 1698 and Senate Report No. 1748, both of the 79th Congress, 2d session, on H. R. 6097, and also statement by Representative A. Willis Robertson, author of the bill, at pages 12 and 14 of the Hearings before the House Committee on Agriculture, February 13 and April 15, 1946.

[13] See *State of Iowa* v. *F. P. C.*, 178 F. 2d 421, 428, cert. den., 339 U. S. 979.

The Petitioners have failed to show that the United States has consented to State control of the fishery resources in the waters of the Deschutes River on lands of the United States reserved for power purposes or reserved for the Warm Springs Indians.

In addition, the treaty between the United States and the Warm Springs Indians, signed in 1855, provides:

> * * * Provided, also, That the exclusive right of taking fish in the streams running through and bordering on said reservation is hereby secured to said Indians; * * *.[14]

The Warm Springs Indians, by giving their approval of the project as provided by Section 10 (e) of the Federal Power Act, and Article 25 of the license (R. 442) will consent to the use of their lands for power purposes and consent to the interference with their exclusive fishing rights by the project. If the Indians give such approval of the project as licensed by the Commission, the State may not, under the guise of conservation of the fishery resources in that stretch of the stream, prevent the construction of project structures on lands within the Indian Reservation. The Indian Tribe and not the State of Oregon has the final authority to control fishing in the Deschutes River bordering on its reservation and the fishery resources on its lands. The fishing rights and the control of fishery resources, given the Indians or reserved by them in the treaty of 1855, is a continuing one against the United States and its grantees as well as against the State and its grantees. *United States* v. *Winans,* 198 U. S. 371.

In the order of the Fish Commission of Oregon, dated May 15, 1951 (Ex. 11, p. 2 of order), the State of Oregon concedes that the Warm Springs River, located within the boundaries of the Warm Springs Indian Reservation, is not within the jurisdiction of the State of Oregon. There the State said:

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[14] The treaty was not ratified by the Senate until after admission of Oregon into the Union, but the treaty relates back to the time it was signed in 1855 (prior to admission of Oregon). *Anthony* v. *Veatch*, 189 Ore. 462, 486; 220 P. 2d 493, 502, 503, 221 P. 2d 575.

> This river is within an Indian reservation and if the Indian service would consent to the transfer of a hatchery site [on the Warm Springs River] to the State, it is extremely unlikely that it would give state jurisdiction over the river which would be necessary for a successful operation of the hatchery. Unless the state laws could be made to apply to this river, which is wholly within the reservation, we could never protect our operation.

The portion of the Deschutes River west of midchannel in the section involved here is wholly within the Indian reservation and exclusive fishing rights in the entire section are secured to the Indians by the treaty. Consequently, the State is without jurisdiction over the stretch of the Deschutes where the Pelton dam is to be built to the same extent that it lacks jurisdiction over the Warm Springs River with respect to fishery resources in that stream.

Since neither the United States nor the Warm Springs Indian Tribe has consented to the control and regulation by the State of Oregon of their reserved lands or waters or the fishery resources in those waters, the only authority required to construct, operate, and maintain the project on those lands is a license under the provisions of the Federal Power Act, plus the consent of the Indians, as the license provides (R. 442).

It is apparent, therefore, that no State laws with respect to the right to use the waters of the allegedly nonnavigable Deschutes River here or to control fishery resources thereon can apply to such waters on the reserved lands of the United States to be occupied by the Pelton Project. The only laws applicable to this situation are to be found in treaties or statutes of the United States governing the disposition or regulation by the United States of its property.

II. The failure of the company to secure State approval for the Pelton Dam is not a bar under Section 9 (b) of the Federal Power Act to issuance of a license for the project

The Petitioners contend that the Commission has no authority to issue the license for the Pelton Project "until the

applicant [the Company] has complied with Section 9 (b) [15] of the Federal Power Act by showing compliance with the laws of the State of Oregon" (Pet. Br. 37–42). The contrary holdings in two *Iowa Cooperative* cases are said by Petitioners not to be applicable here, although no real basis for distinction is shown. The two cases which Petitioners would distinguish are *First Iowa Cooperative* v. *F. P. C.*, 328 U. S. 152, and *State of Iowa* v. *F. P. C.*, 178 F. 2d 421 (C. A. 8, 1949), cert. den., 339 U. S. 979.

Petitioners argue (Pet. Br. 37–42) that the rationale of those cases is limited to licenses for projects affecting navigable water [16] and, therefore, does not relieve the Commission of the necessity of requiring the Company to show compliance with the laws of Oregon since the Pelton Project was not found by the Commission to affect navigable waters of the United States. In addition, Petitioners allege that "There is no conflict between the Oregon laws and the Federal Power Act" (Pet. Br. 42) and contend that such a conflict must exist before the holdings in the *Iowa Cooperative* cases are applicable (Pet. Br. 37).

The attack of Petitioners upon the validity of the license is not based upon an alleged lack of constitutional power in the United States to regulate and dispose of its waters, lands, and other property, but is based upon alleged Congressional grants of power to the State of Oregon over property of the United States as expressed in the right-of-way Acts of 1866 and 1870,

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[15] Section 9 (b) provides:

"SEC. 9. That each applicant for a license hereunder shall submit to the commission— * * *

"(b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this Act."

[16] Lands of the United States were also involved in the *First Iowa* case as the U. S. Supreme Court said (p. 163):

"For the purposes of this application [for license] it is settled that the project will affect the navigability of the Cedar, Iowa and Mississippi Rivers, * * * *will flood certain public lands of the United States;* and will require for its construction a license from the Commission." [Emphasis supplied.]

the Desert Land Act of 1877, the Territory of Oregon Act of 1848, and Section 9 (b) of the Federal Power Act. However, the legislative history of the Federal Power Act and the provisions of the Act demonstrate conclusively that the Commission's license for the project is valid, notwithstanding the inability of the Company to comply with the laws of Oregon which Petitioners claim are applicable.

Prior to 1920, when the Federal Water Power Act was enacted, water-power projects on lands of the United States could be constructed and operated pursuant to the Act of February 15, 1901 (31 Stat. 790). The 1901 Act related not only to land use but to water use as well, and permission could not be given except upon a finding by the proper official that the proposed development would not be incompatible with the public interest.[17]

The Federal Water Power Act of June 10, 1920, combined in one agency the control of water-power developments which had previously been exercised through the Departments of the Interior and Agriculture on lands of the United States and through the War Department on navigable waters. House Report No. 61, 66th Cong., 1st sess., dated June 24, 1919, stated that the purpose of the Power Act was to provide "a method whereby the water powers of the country, wherever located, can be developed by a public or private agency under conditions which will give the necessary security to the capital invested and at the same time protect and preserve every

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[17] Act of Feb. 15, 1901, 31 Stat. 790, 16 U. S. C. 79, 522; 43 U. S. C. 959: "That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of rights of way through the public lands, forests and other reservations of the United States * * * for electrical plants, poles, and lines for the generation and distribution of electrical power, * * * and for water plants, dams and reservoirs used to promote irrigation * * * or any other beneficial uses * * *: *Provided*, That such permits shall be allowed within or through any of the said parks or any forest, military, Indian, or other reservation only upon the approval of the chief officer of the department under whose supervision such park or reservation falls and upon a finding by him that the same is not incompatible with the public interest: * * *"

Act of Feb. 1, 1905, 33 Stat. 628, transferred forest reserves from Interior to Agriculture. Thereafter, the Act of Feb. 15, 1901 was applicable to national forests under the Secretary of Agriculture.

legitimate public interest." The efforts of the Commission were to be "directed toward a constructive national program of intelligent, economical utilization of our power resources." This expression of the purpose of the Act would not appear to express any intent by Congress to separate Federal control over land use from Federal control over water use or water-power development, as suggested by Petitioners, since "every legitimate public interest" could not be protected by the Commission without control over both land and water uses, subject, of course, to vested rights not claimed here which are protected by Section 27 of the Act.

In the *First Iowa* case the Supreme Court has this to say concerning the purposes of the Act (pp. 180–181):

> It was the outgrowth of a widely supported effort of the conservationists to secure enactment of a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation, in so far as it was within the reach of the federal power to do so, instead of the piecemeal, restrictive, negative approach of the River and Harbor Acts and other federal laws previously enacted.
>
> It was a major undertaking involving a major change of national policy.[23] That it was the intention of Congress to secure a comprehensive development of national resources and not merely to prevent obstructions to navigation is apparent from the provisions of the Act, the statutory scheme of which has been several times reviewed and approved by the courts.

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[23] [Note by Court] The nation-wide drive for the passage of this legislation dates back at least to the administration of Theodore Roosevelt and to the enthusiastic support of "the conservationists" led by Gifford Pinchot, as Chief of the Division of Forestry.

"With all its faults the Federal Water Power Act of 1920 marked a great advance. It established firmly the principle of federal regulation of water power projects, limited licenses to not more than fifty years, and provided for Government recapture of the power at the end of the franchise.

"For the first time, the Act of 1920 established a national policy in the use and development of water power on public lands and navigable streams. * * *" Pinchot, The Long Struggle for Effective Federal Water

That Congress did delegate authority to the Commission to control water uses is expressly shown by the provisions of the Act. Section 4 (g) authorizes the Commission to investigate "any occupancy of, or evidence of intention to occupy, for the purpose of developing electric power, public lands, reservations * * *" and "to issue such order as it may find * * * in the public interest to conserve and utilize the * * * water-power resources of the region." Section 7 (a) requires the Commision to decide which of conflicting applications is best adapted to conserve in the public interest the water resources of a region. Both of these sections refer directly to the conservation of water resources whether in navigable streams or in non-navigable streams affecting lands of the United States. Section 10 (a) requires that any project licensed shall be best adapted to a comprehensive plan of development and, of course, such comprehensive development is not possible without Commission control over the use of available waters for power purposes.

It is apparent that none of the sections of the Act looking directly to control of water use could be given any meaning in licensing projects on Government lands should the Court accept the Petitioners' interpretation of Section 9 (b) of the Act that the license issued for the Pelton Project is invalid because the Commission failed to require the Company to comply with State laws which Petitioners say control the water resources to be utilized by the project.

Power Legislation (1945), 14 George Washington L. Rev. 9, 19. See also Kerwin, Federal Water-Power Legislation, c. VI.

The present Act was distinctly an effort to provide federal control over and give federal encouragement to water power development. It grew out of a bill prepared by the Secretaries of War, Interior and Agriculture. It was recommended by a Special Committee on Water Power created in the House of Representatives at the suggestion of President Wilson. See Statement by Representative Sims, Chairman of the Committee on Water Power, 56 Cong. Rec. 9797, 9798. * * * "The problems are national, rather than local; they transcend state lines and cannot be handled adequately except by or in conjunction with national agencies." Statement by David F. Houston, Secretary of Agriculture, quoted in H. R. Rep. No. 61, 66th Cong., 1st Sess., p. 5.

Furthermore, if the Petitioners' contention (Pet. Br. p. 16, point 5; pp. 20; 26) that Congress did not delegate to the Commission authority to control water use for power purposes is valid, then Section 27 of the Act [18] is meaningless insofar as it protects certain water rights vested under State law. If Petitioners are correct in this argument, then the Commission cannot interfere with *any* vested or potential water rights, whether protected by Section 27 or not.

In the *First Iowa* case, the supreme Court held that Section 27 does not protect vested rights in water appropriated for generation of electric power.[19] Consequently the Commission is not compelled by the provisions of either Section 9 (b) or Section 27 of the Act to require compliance by the Company with the Oregon laws with respect to acquisition of water rights upon lands of the United States for power purposes. There being no claim here that vested rights have been acquired for the protection of which State intervention is necessary, Section 27 is not applicable.

Moreover, insofar as the claims of Petitioners rest upon other Federal statutes, such claims are unsupportable for there is direct repeal of conflicting Federal statutes by Section 29 of the Federal Power Act which provides: "That all Acts inconsistent with this Act are hereby repealed * * *" This repealing

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[18] "SEC. 27. That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein."

[19] "The effect of § 27, in protecting state laws from supersedure, is limited to the laws as to the control, appropriation, use or distribution of water in irrigation or for municipal or other uses of the same nature. It therefore has primary, if not exclusive, reference to such proprietary rights. The phrase 'any vested right acquired therein' further emphasizes the application of the section to property rights. There is nothing in the paragraph to suggest a broader scope unless it be the words 'other uses.' *Those words, however, are confined to rights of the same nature as those relating to the use of water in irrigation or for municipal purposes.*" [Italics added.] (pp. 175–176.)

clause finds effect in the requirements of Section 10 (a) and other provisions of the Power Act limiting licenses to those projects which conform to the best plan for comprehensive development of the water resources, whether in navigable streams or in nonnavigable streams on Government lands. The repealing clause of Section 29, therefore, makes it clear that if the Acts of 1866, 1870, 1877 and the Territory of Oregon Act of 1848 are inconsistent with the Federal Power Act in their grant of powers to Oregon, they are repealed to the extent that they may be inconsistent with the regulation and control of the reserved Federal lands to be occupied by the Pelton Project. *First-Iowa Cooperative* v. *F. P. C., supra.*

At page 181 the Court said in that case:

> The detailed provisions of the [Federal Power] Act providing for the federal plan of regulation leave no room or need for conflicting state controls.[20]

Here the impact of the State laws would be precisely the same as in the *First Iowa* case. Both States would prohibit power plants authorized by the Commission; in this case under fishery laws and in the *First Iowa* case under an antidiversion statute.

Finally, even if it be assumed for the purposes of argument that there is no conflict bewteen the Oregon laws and the Federal Power Act, as Petitioners contend (Pet. Br. 37), nevertheless the license is valid. This principle was established in the *First Iowa* litigation. In its decision the Supreme Court said (p. 178):

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[20] Another Court of Appeals recently held that the costs of water power rights alleged to have been acquired under State law were properly chargeable as project operating expenses, *Niagara Mohawk Power Co.* v. *F. P. C.*, C. A. D. C., case No. 10862, decided December 31, 1952. However, the court was not required to rule upon the necessity for compliance with State laws to validate operation of the project under the FPC license. One Judge dissented and the Commission has recommended to the Solicitor General that a petition for certiorari be filed.

> The references made in § 9 (b) [Federal Power Act] to beds and banks of streams, to proprietary rights to divert or use water, or to legal rights to engage locally in the business of developing, transmitting, and distributing power neither add anything to nor detract anything from the force of local laws, if any, on those subjects.
>
> * * * * *
>
> The need for compliance with applicable state laws, if any, arises not from this federal statute [Federal Power Act] but from the effectiveness of the state statutes themselves.

When the second *Iowa Cooperative* case was before the Eighth Circuit on appeal this principle was again expressly stated. That Court said (178 F. 2d at page 427):

> We gather from the opinion of the Supreme Court that, while the Federal Power Commission may properly concern itself with the question whether an applicant for a license can comply with applicable state laws, if any, relating to the proposed project and the business in which the applicant proposes to engage, the Commission is not compelled to do so, but may license the project and let the licensee take his chances of being able to comply with the applicable state laws, or such of them as have not been superseded by the Federal Power Act. We think that the challenged orders of the Commission may not be invalidated by this Court because of the asserted noncompliance by the Commission with § 9 (b) of the Act.

Thus it is apparent that the Oregon laws relied upon by Petitioners here, whether in conflict with the Federal Power Act or not, can be no bar to the issuance of a valid license for the Pelton Project.

III. Petitioners' contentions with respect to fishery resources and recreation are without basis in law

Petitioners contend that several findings of fact made by the Commission in its opinion and in its order issuing a license for the Pelton Project are not supported by substantial evidence (I. W. L. Br. 2–4, 13–15).[21] Only those findings stated to be objectionable in Petitioners' statement of points upon which they intend to rely (App. B) are before the Court and only those findings will be considered in this brief. (For failure to preserve other objections, see *supra* 5–6.) The Commission findings questioned relate to the anadromous and sports fishery resources and recreational uses in the Deschutes River.

Petitioners, speaking through the Izaak Walton League, would have the Court believe that the Commission, with callous disregard of local interests, deliberately authorized the destruction of valuable fishery resources through the construction of this power development in such a way as to completely prevent the use of this stream for any other purposes, including the propagation of fish, with the attendant loss in recreational and commercial values. This was not the case, but on the contrary the Commission required a substantial initial investment ($4,430,000, R. 420) by the licensee and large annual expenditures ($795,000, R. 421, 437), several times greater than the fishery values given by witnesses for Petitioners, in order to preserve and possibly enhance the value of this stream as a fishery resource. As a matter of fact, if there is any unreasonableness shown by the record before the Court it lies at the door of those who would preserve the fishery values of this stream by preventing any development of these water-power resources, notwithstanding the extraordinary measures directed to harmonize both types of water use.

Indeed, the several values of these water resources were recognized by the Commission in its finding that the proposed

[21] The objections to the Commission's findings of fact and the argument thereon are contained in the brief filed by The Oregon Division of the Izaak Walton League of America, Inc. as Amicus Curiae, which speaks also for Petitioners (Pet. Br. 15). We, therefore, regard the arguments as those of Petitioners.

development would be best adapted to comprehensive development of this region (R. 439):

> (44) Under present circumstances and conditions, and upon the terms and conditions hereinafter provided in the license, the project is best adapted to a comprehensive plan for the improvement and utilization of waterpower development, for the conservation and preservation of the fish and wildlife resources, and for other beneficial public uses including recreational purposes.

This finding, which conforms to the provisions of Section 10 (a) of the Power Act,[22] is the only finding relating to the beneficial public purposes (including recreation and conservation of fish) required by the licensing statute.

In Petitioners' assignment of errors (Pet. Br. ii–vii and I. W. L. Br. i–iv) this finding is not questioned and the only direct reference to it is an undocumented statement by Petitioners in their "conclusion" (Pet. Br. 43) to the effect that it is not supported by substantial evidence.

Section 313 (b) of the Power Act expressly provides that the findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. Inasmuch as Petioners made no attempt to present any facts or to show a lack thereof which might suggest that this statutory finding made pursuant to Section 10 (a) is not a finding of fact or that it is not supported by substantial evidence, it is conclusive and binding on this review.

The findings questioned by Petitioners are incidental to this required statutory finding.[23] An examination of the record

[22] Section 10 (a) provides, in part:

SEC. 10. All licenses issued under this Part shall be on the following conditions:

"(a) That the project adopted * * * shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways * * * for the improvement and utilization of waterpower development, and for other beneficial public uses, including recreational purposes."

[23] The Court of Appeals for the District of Columbia Circuit, in discussing incidental findings to a required statutory finding said that even if some of the incidental findings were unsupported, the orders under review should be affirmed since without them there would still be a basis in the record for the Commission's conclusions. *Panhandle Eastern Pipeline Company* v. *F. P. C.*, 169 F. 2d 833, cert. den., 335 U. S. 854.

clearly demonstrates that, contrary to the contentions of Petitioners, the findings in question are supported by substantial evidence.

The Commission in its opinion set forth the facts and reasons in support of its finding "that nothing in the Army report or the Fisheries Plan * * * would preclude the issuance of a license for the Pelton Project" (R. 423–424). There the Commission said:

> But it should be noted that the Army review report contains no discussion of possible power development at or near the Pelton site, and consequently, the applicant's proposal is not contrary or inconsistent with the Army's recommendations for power development on the Deschutes River. While Congress has appropriated funds for the Fisheries Plan, Congress has not given its approval to that plan or to the basin plans of the Army engineers.

In addition to those facts, which have not been controverted or denied by Petitioners, the evidence shows that the Deschutes River need not be considered as essential to the Lower Columbia Fishery Plan in view of the rights of the Warm Springs Indian Tribe to all fish in the Warm Springs River and in the Deschutes and Metolius Rivers where they form the boundary of the Indian Reservation (*supra* 14–15), and due to the additional fact that the Oregon State legislature, although urged to do so, failed to enact a proposed bill in 1949 to establish the Deschutes River as a fish refuge by prohibiting the construction of power dams on that river (R. 560). The facts show conclusively that the finding is amply supported.

The finding that "there is no substantial evidence to show any serious injury to sports or recreational fishery * * *" is based upon the estimate of Petitioners' own witnesses that the value of the sport fishery claimed to be lost by the flooding of 12 miles of the river would be about $2,000 per mile or $24,000 annually (R. 703, 727–728, 747–748), a relatively small loss and not a serious one when compared with the remaining hundreds of miles of stream available for sports fishery. This loss also is not serious when considered in connection with the

$450,000 annually which the Commission found to be the net value of the project (R. 421–422). The stretch of the river to be flooded is not now readily accessible to fishermen or for recreation use, being in a deep canyon (R. 594–596). There is evidence that fishermen very seldom use the stretch of the river immediately above and below the dam site (R. 594). The project dam and reservoir will raise the water surface 150 feet making the reservoir readily accessible for fishing and other recreational use, particularly if the State constructs a proposed highway through the canyon (R. 586, 596–597, 605–607). In addition, roads to be built to the dam during construction of the project will be later available for use by fishermen and recreationists (Ex. 13). Aside from the fishing, the reservoir will provide other recreational opportunities not now available in the area. It is, of course, common knowledge that artificial reservoirs in the Pacific Northwest attract people from local as well as distant areas for sightseeing, picnicking, boating and lake fishing. There is no evidence in the record to indicate that the Pelton reservoir will not become a similar recreation area.

The "tremendous drawdown" stressed by Petitioners as being detrimental to recreational use of the reservoir (I. W. L. Br. 7) will average about six feet (Tr. 486–487) and will scarcely be noticeable nor will it make the area around the reservoir less attractive since the canyon walls are steep and thus no unsightly mud flats will be exposed upon drawdown (Tr. 470).

There is an abundance of evidence to support the finding that "the Descutes River is not now, nor has it been in recent years, a particularly plentiful producer of salmon and steelhead trout" and the same evidence amply support the further finding that "the likelihood of its becoming so [above the Pelton site] in the near future is rather remote" (R. 426).

Continually increasing irrigation diversions have completely dried up the upper reaches of the Deschutes and Crooked Rivers during low flow periods and consequently the Deschutes River now supports only a small remnant of its former salmon and steelhead runs and sports fish (R. 720; Rev. Rep. Col.

River, App. P, pp. 60–61), a situation which cannot be attributed to the proposed dam.

There is no substantial evidence in the record that the Deschutes River will ever produce more fish in its natural state than it does now. Although the spawning beds have been surveyed qualitatively (Ex. 30–A, 30–B, 30–C) no quantiative measurements have been made (R. 714–715, 1021–1022). No studies have been made of the productive capacity of the existing fishery (R. 806, 1022) or of the migrations of the fish (R. 748). Although the fish productivity of a stretch of river is limited by its rearing capacity (R. 993–994) no studies have been made to determine this factor in this stream (R. 1022, 1030). All of this information would be required to support Petitioners' contentions that the Deschutes can, in its natural state, produce substantially more anadromous fish than it is now producing (I. W. L. Br. 10–11).

The Deschutes, like any other river, is capable of producing only a certain number of fish of all types. This productive capacity is determined in a large measure by the natural environment, particularly the amount of natural fish food available. Since the Deschutes River system is a large producer of resident trout fish (R. 726–727; Ex. 31, p. 1), a large portion of the productive capacity of the river system is necessarily devoted to the maintenance of those trout. Consequently, only the productive capacity not being utilized by the resident trout, the predominant fish in the stream, is available to maintain the anadromous fishery. Further, the natural production of anadromous fish is limited by the fact that resident trout eat young salmon and steelhead (R. 752) and also carry diseases which are very injurious to anadromous fish (R. 995–996).

Attempts made by Petitioners' witnesses to use intuitive estimates (R. 1017–1018) and comparisons with other streams with dissimilar characteristics and with different runs of anadromous fish (R. 1029–1030), do not constitute an adequate basis to question the findings.

The Deschutes River is not a relatively large producer of anadromous fish above the Deschutes site. Petitioners estimated that 2,500 salmon and 5,000 steelhead migrate past the site each year, but no fish counts were made to substantiate this.

These estimates were only rough guesses based on an average annual entrapment at the Metolius racks of 258 salmon annually (R. 760–761, 846–848, 865, 871, 916–921, 929–930) and the steelhead estimate was based on even less substantial guesses (R. 872, 874–876, 921–923). The Metolius racks and fish trap capture substantially all of the salmon migrating that far upstream (R. 848). Even if these inadequately supported estimates are accepted, they do not show that the Deschutes is now a plentiful producer of salmon and steelhead trout (R. 194). Furthermore, the fact that the State and the Federal governments were willing to spend substantial sums in the construction and operation of the Metolius hatchery in an effort to rehabilitate the fish runs indicates that the Deschutes is not now a plentiful producer.

The Commission's finding that no substantial evidence was brought forward to show that the facilities proposed for conserving the fish runs will not maintain existing runs and its further finding that there are indications that the runs can be increased (R. 426, 437) are based almost entirely upon evidence presented by Petitioners which demonstrated conclusively that the runs can be maintained and possibly increased. The proposed facilities have been planned in accordance with a program set up by the Oregon Fish Commission (Exs. 10, 12, 13) which advised that the plan is the only one with any great chance of success (Ex. 12, last page). Doubt was raised with respect to the success of the operation of the fish conservation facilities on several grounds, including suitability of water for holding adult fish, injury to fish, losses in holding ponds, disease, and dietary matters (R. 766–777, 794–795, 802, 840–842, 995–996). The record shows, however, that there is an adequate supply of suitable water of proper temperature available from springs which feed directly into the reservoir if the water from the reservoir should prove unsuitable (R. 600–601); that Spring Chinook salmon have been held successfully in artificial ponds elsewhere (R. 718, 720); that Spring Chinook salmon are now being successfully trapped without undue injury in the Metolius; and that the success in raising young Spring Chinook salmon at the North Santiam hatchery above the Detroit dam in Oregon indicates that disease and other problems associated

with rearing young Spring Chinook salmon are not too serious (R. 785–786). The experimental work being done at that hatchery will also be helpful in planning and operating the Metolius hatchery above the Pelton site (R. 786–787, 794–795). There is no evidence that artificial propagation of steelhead trout will not be successful at the Metolius hatchery in view of the success experienced with resident trout (R. 794–795). These facts, when considered with the failure of the fish experts to point out any unique feature in the plan, not only support the finding relative to the success in maintaining runs, but also show that "there is nothing novel, unusual, or out of the ordinary with respect to the fishery conservation facilities proposed by applicant" as found by the Commission (R. 437). Admittedly there is ample evidence in the record with respect to the success of artificial propagation of anadromous fish (R. 570; Exs. 2, 12, 29, 34).

The Commission found that the applicant proposes to operate or arrange for operation of fish conservation facilities in accordance with approved methods and the license provisions will require such operation (R. 445–446). Moreover, the applicant has agreed on the record to defray the additional hatchery expenses and the cost of operating and maintaining the fish facilities at an annual cost of about $795,000 (R. 421, 437).

The construction, operation, and maintenance of the project will not be detrimental to the fishery resources below the reregulating dam. This dam was insisted upon by the Hydroelectric Commission of Oregon (R. 506; Ex. 8). The project will be operated in such a manner as to maintain flows below that dam of the same magnitude as would exist under natural conditions in order to maintain that section of the river in its existing condition for the benefit of fish life, as desired by the State (Exs. 9, 10). It has not been shown that the quality of water to be released from the Pelton reservoir will be detrimental to fish downstream. Comparison of the Aerial reservoir on Lewis River (Ex. 32) with Pelton is inconclusive with respect to quality of water to be provided by Pelton because adequate correlations of watersheds, drawdowns, storage cycle, run-off, and types of ground cover, were not made (R. 819, Tr. 1240–1241).

The findings of the Commission on all of the contested factual points are supported by substantial evidence. Nevertheless, Petitioners in effect ask the Court to review the evidence merely because they call attention to the portions which they regard as favorable to their arguments and ignore contrary evidence. This, of course, is asking the Court to reach a conclusion opposite to that reached by the expert body set up by Congress for the purpose of making the decisions called for by the Federal Power Act. Such weighing of technical evidence is clearly contrary to the statutory scheme of judicial review provided in Section 313 (b) of the Act and contrary to established principles.

The Court cannot substitute its judgment for that of the Commission. As was said by the Supreme Court, in *National Labor Relations Board* v. *Link-Belt Company,* 311 U. S. 584, 597:

> Congress entrusted the Board, not the Courts, with the power to draw inferences from facts. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines,* 303 U. S. 261, 271; *National Labor Relations Board* v. *Falk Corp.,* 308 U. S. 453, 461. The Board, like other expert agencies dealing with specialized fields (see *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 146; *Swayne & Hoyt* v. *United States,* 300 U. S. 297, 304), has the function of appraising conflicting and circumstantial evidence, and the weight and credibility of testimony.

The Commission found from its analysis of the evidence that the proposed Pelton Project is in the public interest; will provide for comprehensive development of the affected stretch of the Deschutes River; will be consistent with further comprehensive development of that stream and of the Columbia basin; and that the improvements proposed will not accrue if the river is maintained in its present natural condition (R. 427). On the basis of this finding and conclusion the Commission issued a license for the Pelton Project containing conditions which the Commission found would conserve and possibly enhance the fishery resources of the Deschutes River (R. 427).

As there is a rational basis and substantial evidence for the Commission's conclusions, they are binding on Court review. *State of Iowa* v. *F. P. C., supra,* at pages 427–428; *Montana Power Company* v. *F. P. C.,* 112 F. 2d 371, 374; *Rochester Tel. Corp.* v. *United States,* 307 U. S. 125, 146; *Market Street R. Co.* v. *Railroad Comn.,* 324 U. S. 548, 559–560.

The Petitioners' contentions that the Commission's findings are not supported are without basis in law and the Commission's order must stand unless the Court is to substitute its judgment for that of the Commission on the adaptability of the project to the comprehensive development of the water resources involved, a substitution not permissible under the review provisions of Section 313 (b) of the Federal Power Act.

CONCLUSION

The order of the Federal Power Commission here under review is valid, is based upon substantial evidence of record, and should be affirmed.

BRADFORD ROSS,
General Counsel,
WILLARD W. GATCHELL,
Assistant General Counsel,
JOHN C. MASON,
Attorney,
Counsel for Respondent, Federal Power Commission.

FEBRUARY 1953.

APPENDIX A

FEDERAL POWER COMMISSION,
Washington 25, July 7, 1952.

Hon. ARTHUR G. HIGGS,
Assistant Attorney General of Oregon,
1634 Southwest Alder Street, Portland 8, Oregon.

Re: *State of Oregon, et al.* v. *Federal Power Commission,* No. 13345

DEAR MR. HIGGS: I am filing today respondent's designation of additional parts of the record and the executed stipulation submitted by you concerning use of exhibits by the Court and also concerning the September 1, 1951, order of the Oregon Commission. A copy of my letter to the Clerk of the Court and 15 copies of our designation is being sent under separate cover.

* * * * *

Under points upon which petitioners intend to rely you list:

> 5. Under Section 10 (a) of the Federal Power Act, the proposed project is not in the public interest.

In view of the fact that your other points and the findings you challenge relate primarily to questions of law and to the fishery resource and recreational issues, we have assumed that your statement of point 5 does not go beyond the subject matter of your other points. With this in mind we have omitted substantially all of the testimony relative to power value, power market and other aspects of the purely power and economic phases of the case. Your advice will be appreciated as to the correctness of our assumptions concerning your point.

* * * * *

Sincerely yours,

(S) JOHN C. MASON,
Attorney.

OREGON STATE GAME COMMISSION,
1634 S. W. ALDER STREET,
Portland 8, Oregon, July 11, 1952.

Received July 16, 4:48 p. m., 1952, Federal Power Commission.

Mr. JOHN C. MASON,
Attorney, Federal Power Company,
Washington 25, D. C.

Re: *State of Oregon et al.,* v. *Federal Power Commission,* United States Court of Appeals, Ninth Circuit, No. 13345

DEAR MR. MASON: This will acknowledge receipt of and thank you for your letter of July 7, 1952, in which you informed me that you had on that day filed respondent's statement of points and designation of the record.

* * * * *

You are correct in your assumption that our statement of point 5 does not go beyond the subject matter of our other points. I did not, during the hearing before the Federal Power Commission, or in the several briefs filed by me, question the testimony relative to power value, power market and other aspects of the purely power economic and technical phases of the case.

* * * * *

Sincerely yours,

(S) ARTHUR G. HIGGS,
Assistant Attorney General.

APPENDIX B

In the United States Court of Appeals for the Ninth Circuit

* * * * *

No. 13345, Civil

* * * * *

IN THE MATTER OF PORTLAND GENERAL ELECTRIC COMPANY (AND NORTHWEST POWER SUPPLY COMPANY)

THE STATE OF OREGON, THE FISH COMMISSION OF OREGON, THE OREGON STATE GAME COMMISSION, INTERVENORS, PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT

* * * * *

PETITION FOR REVIEW TO SET ASIDE AN ORDER OF THE FEDERAL POWER COMMISSION

PETITIONERS' STATEMENT OF POINTS AND DESIGNATION OF RECORD

Pursuant to Rule 19, Paragraph 6 of this Court, the State of Oregon, the Fish Commission of Oregon, and the Oregon State Game Commission, petitioners, hereby make the following statement of points on which they intend to rely in this proceeding, together with a designation of all of the record which is material to the consideration of the review herein.

POINTS ON WHICH PETITIONER INTENDS TO RELY

1. The Federal Power Commission does not have jurisdiction, power, or authority to authorize and to license the construction, operation, and maintenance of the proposed project.

2. The Deschutes River and its tributaries are internal and nonnavigable streams of the State of Oregon.

3. The proposed project will not affect interstate or foreign commerce.

4. The operation of the proposed project in conjunction with the re-regulating dam will prevent the project from adversely affecting interests downstream, and will not affect the navigable flow or the navigable capacity of the Columbia River.

5. Under Section 10 (a) of the Federal Power Act, the proposed project is not in the public interest.

6. There is no provision in the Federal Constitution delegating to the central government power to control the acquisition and use of nonnavigable streams.

7. Under the Acts of Congress of 1866, 1870 and 1877 (Desert Land Acts 43, U. S. C. A. 321), the Federal Government irrevocably and unconditionally surrendered, or relinquished to the States, including the State of Oregon, whatever rights the Government may have had to control the use of the waters of nonnavigable streams.

8. Under the Territory Act of Oregon of August 14, 1848, it was provided that rivers and streams of water in the Territory of Oregon in which salmon are found, shall not be obstructed by dams or otherwise, unless such dams or obstructions are so constructed as to allow salmon to pass freely up and down such rivers and streams.

9. Under the Constitution and laws of the State of Oregon, no person may construct a dam in any of the streams of this State to a height that will make a fish ladder or fishway thereover impracticable, without first having obtained from the Fish Commission of Oregon a permit to construct such a dam.

10. Under the provisions of Section 116–401, O. C. L. A., all waters within the State of Oregon, from all sources of water supply, belong to the public.

11. The common law doctrine of riparian rights has been abrogated in Oregon by statute.

12. Under the Constitution of Oregon, 1859, the rights, title, and interest in and to all water for the development of water power, and to water power sites which the State of Oregon owns or hereafter acquires, shall be held in perpetuity.

13. Under the provisions of the Oregon Water Code, the waters of the State of Oregon may not be appropriated without its consent.

14. No right to appropriate or to use the waters of the lakes, rivers, streams, or other bodies of water within the State of Oregon, including water over which the State has concurrent jurisdiction in connection with the development of any water power project for the generation of electricity, shall be initiated, perfected, acquired or held, without the consent of the State of Oregon.

15. The Federal Power Commission may not act as a substitute for the local authorities over such questions as the right to use, appropriate, divert, or impound the waters of a nonnavigable stream in the State of Oregon.

16. The Federal Power Commission has no authority to allocate the use of the waters of the Deschutes River and its tributaries in connection with the Pelton project under the license granted to the Portland General Electric Company.

17. The Federal Power Commission has no authority to grant to the Portland General Electric Company, the applicant, a license to construct the project in question until the applicant has complied with Section 9 (b) of the Federal Power Act by showing compliance with the laws of the State of Oregon.

18. The Fish Commission of the State of Oregon had denied a permit to the Portland General Electric Company to construct the Pelton Dam.

19. The Hydroelectric Commission of Oregon has denied the Portland General Electric Company's application, and supplemental applications, for a preliminary permit to construct the hydroelectric project in question.

THE FOLLOWING FINDINGS OF FACT MADE BY THE COMMISSION ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

1. We find nothing in the Army report or the Fisheries Plan which would preclude the issuance of a license for the Pelton project if it is a desirable project in the public interest and meets the standards prescribed by the Federal Power Act.

2. * * * but there is no evidence to show any serious injury to the sports or recreational fishery. In any event any such injury would be offset to some extent, if not entirely, by the lake fishery and the recreational opportunities to be provided by the project reservoir.

3. The Deschutes River is not now, nor has it been in recent years, a particularly plentiful producer of salmon and steelhead trout.

4. The record shows, as found by the Examiner, that the Deschutes River above the Pelton site is not now a relatively large producer of anadromous fish and the likelihood of its becoming so in the near future is rather remote.

5. After examining the record, we are in agreement with the Examiner that no substantial evidence has been brought forward to show that the facilities proposed for conserving the fish will not maintain existing runs. Moreover, there are indications that the runs can be increased.

6. The record fails to show that the Deschutes River system above the Pelton site is capable under natural conditions of producing anadromous fish in substantially greater numbers than are now produced there.

7. There is nothing novel, unusual or out of the ordinary with respect to the fishery conservation facilities proposed by applicant.

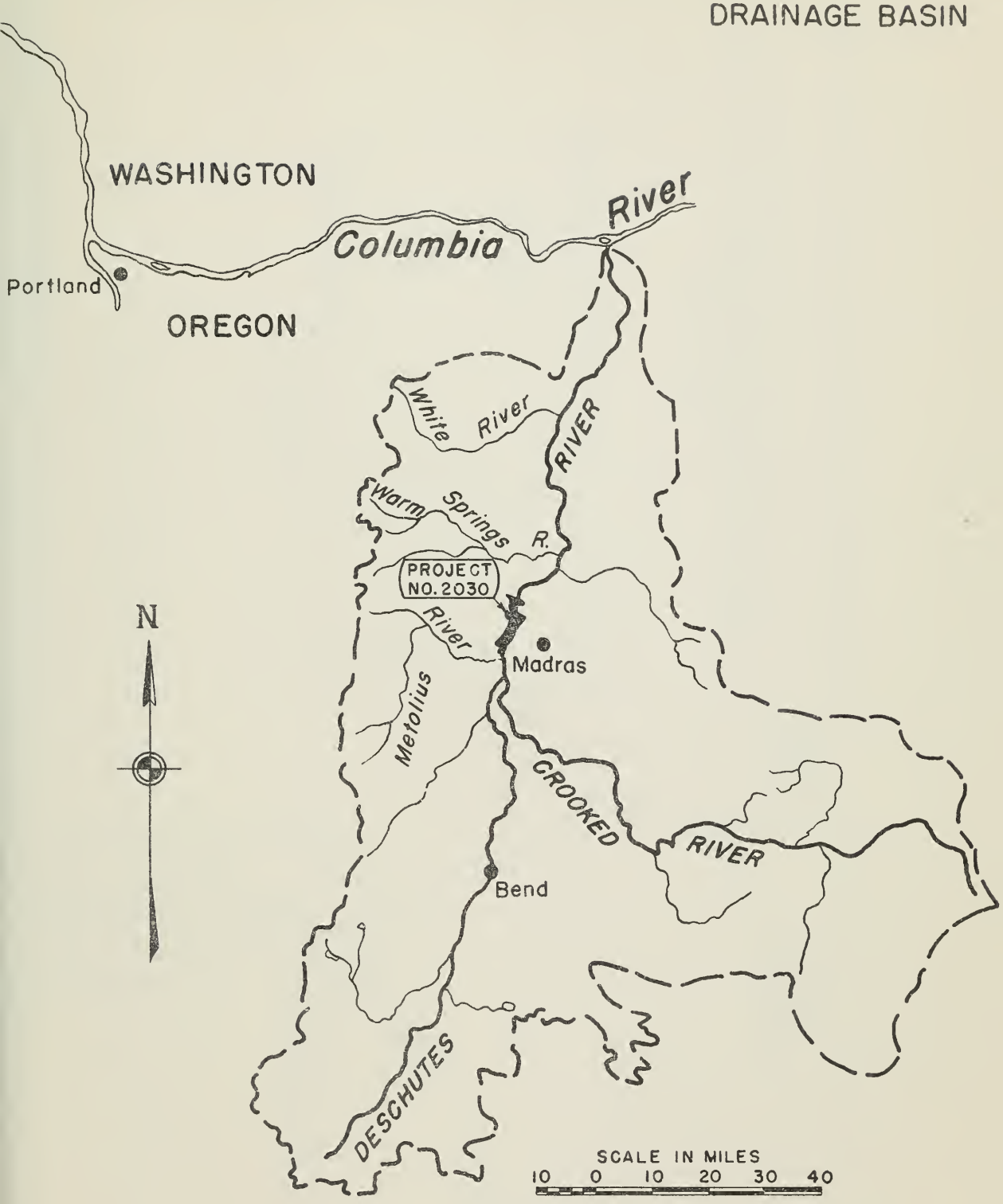
8. The applicant proposes to operate or arrange for the operation of the fish conservation facilities in accordance with approved methods.

9. Construction, operation and maintenance of the Pelton project will not be detrimental to the fishery resources below the re-regulating dam.

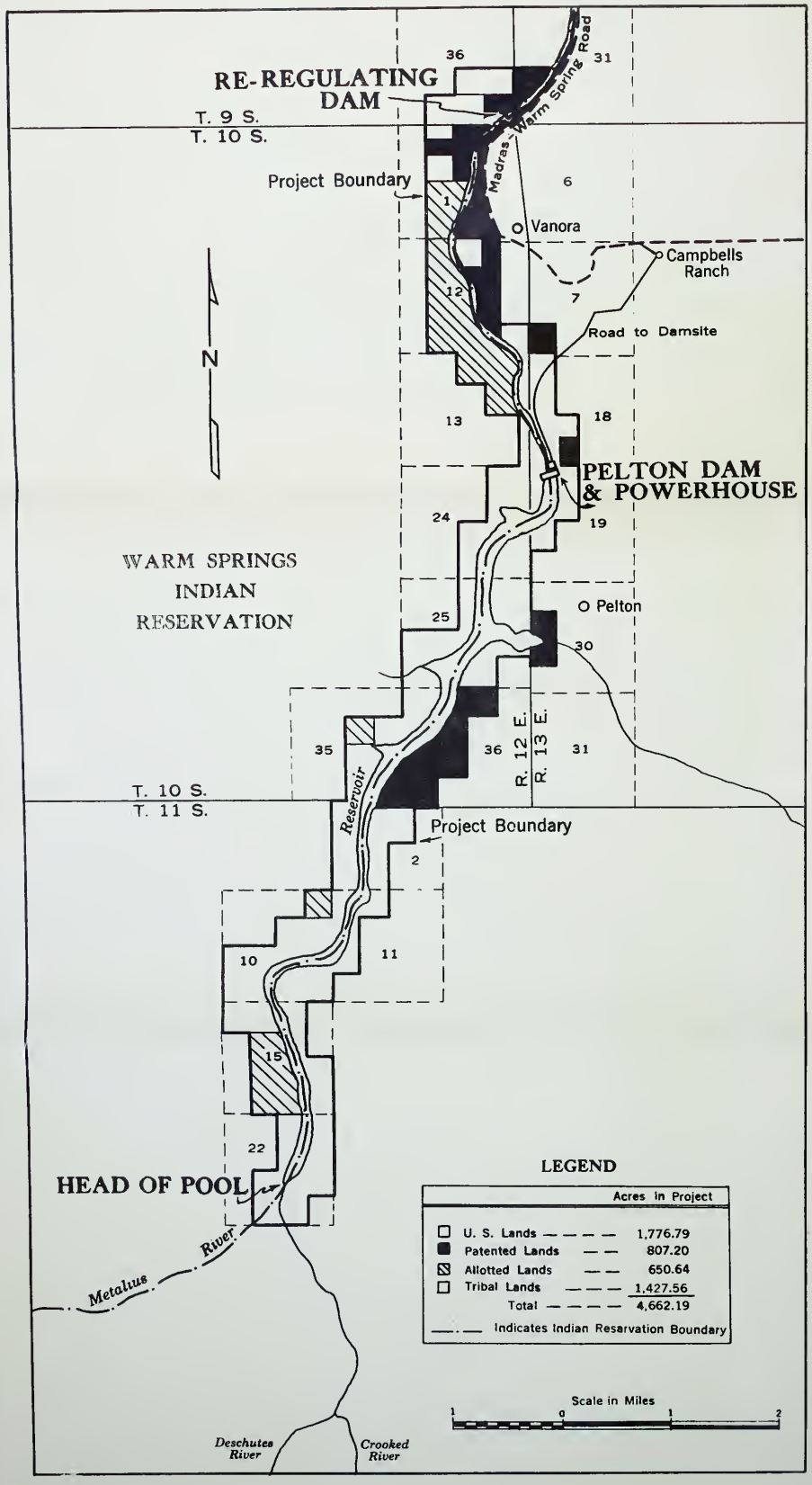
10. The Portland General Electric Company is a corporation organized under the laws of the State of Oregon and has submitted satisfactory evidence of compliance with the requirements of all applicable State laws insofar as necessary to effect the purposes of a license for the project.

U. S. GOVERNMENT PRINTING OFFICE: 1953

DESCHUTES RIVER DRAINAGE BASIN



SOURCES OF INFORMATION: APPENDIX K-PLATES 21 & 36
"REVIEW REPORT ON COLUMBIA RIVER AND TRIBUTARIES"
CORPS OF ENGINEERS, DEPT. OF ARMY - OCT. 1, 1948, PRINTED AS
HOUSE DOCUMENT 531, 81 ST. CONGRESS, 2 ND SESSION
AND EXHIBIT 3 IN RECORD.


RE-REGULATING DAM
T. 9 S.
T. 10 S.
Project Boundary
Madras - Warm Spring Road
Vanora
Campbells Ranch
Road to Damsite
N
PELTON DAM & POWERHOUSE
WARM SPRINGS INDIAN RESERVATION
Pelton
R. 12 E.
R. 13 E.
T. 10 S.
T. 11 S.
Reservoir
Project Boundary
HEAD OF POOL
Metolius River
Deschutes River
Crooked River
36
31
6
1
12
7
13
18
24
19
25
30
35
36
31
2
10
11
15
22
LEGEND
Acres in Project
U. S. Lands 1,776.79
Patented Lands 807.20
Allotted Lands 650.64
Tribal Lands 1,427.56
Total 4,662.19
Indicates Indian Reservation Boundary
Scale in Miles
1 0 1 2